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No. 88-1304

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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IN THE SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1988

UNION CARBIDE CORPORATION,

Petitioner,

v.

SUPERIOR COURT FOR THE STATE OF CALIFORNIA
FOR THE CITY AND COUNTY OF SAN FRANCISCO,

Respondent,

VILLMAR DENTAL LABS, INC., A CALIFORNIA CORPORATION,
NOWELL'S, INC., A CALIFORNIA CORPORATION, AND
BEAPER, INC., A CALIFORNIA CORPORATION,

Real Parties In Interest.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL

FRANCIS O. SCARPULLA
Counsel of Record
SCARPULLA & SCARPULLA
A Professional Corporation
The Alcoa Building
1 Maritime Plaza, Suite 1040
San Francisco, CA 94111
(415) 788-7210
Attorneys for Plaintiffs and Real Parties In Interest

[Additional Counsel Appear on Signature Page]

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QUESTIONS PRESENTED

1. Is this Petition taken from the denial of a summary judgment motion ripe for review by this Court?

2. Assuming, *arguendo*, that this Petition is ripe for review, does California's amendment to its antitrust laws, Business Professions Code, Section 16750(a), permitting indirect-purchaser damage actions for state-law violations, so conflict with the purposes of the federal antitrust laws that it must be pre-empted by this Court's indirect-purchaser decision in *Illinois Brick Company v. Illinois*, 431 U.S. 720 (1977)?

LIST OF PARTIES AND RULE 28.1 LIST

The parties to the proceedings below are the Petitioner, Union Carbide Corporation, the Respondent, Superior Court of the State of California for the City and County of San Francisco, and Real Parties in Interest, Villmar Dental Labs, Inc., Nowell's, Inc., and Beaper, Inc.

None of the Real Parties in Interest is owned by any parent corporation; none owns any subsidiaries or has any affiliates.

Petitioner Union Carbide Corporation's Rule 28.1 list of parent companies, subsidiaries and affiliates has already been set forth in the Petition for Writ of Certiorari.

Real Parties do not know of any other interested parties.

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I

INTRODUCTION

This Petition reaches this Court from the denial of a motion for summary judgment filed by petitioner, Union Carbide Corporation ("Union Carbide"), the defendant below, in the Superior Court of the State of California for the City and County of San Francisco. The California Court of Appeal denied Union Carbide's Petition for Writ of Mandate and the California Supreme Court denied a hearing. Petitioner then sought review by way of certiorari in this Court.

No discovery has been taken of Union Carbide in this action. The class certification motion has as yet not been ruled upon. This case is in the pleading stages only. Thus, there is no factual record which this Court can review to determine whether Union Carbide's predictions about the outcome of this case will, in fact, occur.

II

THIS CASE IS NOT RIPE FOR REVIEW

Because this case is in its early pleading stages, and because there is no record for this Court to review regarding any of the factual matters asserted by Union

Carbide, Real Parties respectfully suggest that this Court should deny Union Carbide's Petition for Writ of Certiorari at this time. Therefore, until there is a complete record developed in the trial court any predictions Union Carbide may make about multiple liability is simply speculative at this stage of these proceedings. As this Court knows, there was no verdict against Union Carbide in the federal direct-purchaser action. Neither has there been any verdict against Union Carbide in this proceeding in the state court. Union Carbide simply settled the federal case, denying all antitrust liability. There has been no factual showing that Union Carbide will be subjected to liability of any kind in this state-court action, much less multiple liability. Thus, there is no showing that the pre-emption doctrine or the due process clause are implicated in these proceedings.

III

NO REVIEW OF THE PRE-EMPTION ISSUES IS APPROPRIATE AT THIS TIME

Review of the present case is inappropriate because this Court heard oral argument in *State of California v. ARC America Corporation*, Docket

No. 87-1862, 109 S.Ct. 51 (1988), on February 27, 1989. That case which raised, in part, similar pre-emption and due process issues may resolve similar issues in this case. Obviously, if those questions are reached, this Court's decision in *ARC America* will be controlling on all state courts regarding the pre-emption and due process issues. Therefore, it is unnecessary for this Court to docket this case on those similar issues at this time.[1]

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1. Should this Court not reach the issue of whether a state-court proceeding under a state's antitrust laws is pre-empted by *Illinois Brick's* ban on indirect-purchaser damage actions for Sherman Act violations in *ARC America*, then this Court may wish to consider taking that issue in this case.

IV

CONCLUSION

For the above-stated reasons Real Parties respectfully suggest that this Court should deny Union Carbide's Petition for a Writ of Certiorari at this time.

Dated: March 3, 1989

FRANCIS O. SCARPULLA
Counsel of Record
SCARPULLA & SCARPULLA
Attorneys for Plaintiffs and Real Parties in Interest

OF COUNSEL:

NORMAN H. STONE
LAW OFFICES OF
NORMAN H. STONE
239 Miller Avenue
Mill Valley, CA 94941

MARTIN H. EBER
PRATT & EBER
220 Sansome Street
14th Floor
San Francisco, CA 94104